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ABSTRACT

The questions of what a school system must show in order to be declared "desegregated" continue to be defined by the Supreme Court. This paper presents an overview of the original "Brown v. Board of Education" decision and the large body of case law that has evolved from it. Although over 500 school districts have been ordered to desegregate over the last 40 years, very few of these schools have been found by the courts to have completed the process, that is, declared "unitary." The first section reviews the original "Brown" holding and the establishment of court supervision of school boards' implementation of desegregation plans. The second section explores how courts applied the "Brown" mandate and created the vague terminology at issue in modern desegregation litigation. The final section reviews the "compensatory education" alternative, which focuses on improving education for minority students by means other than strict numerical integration, as well as the special problems found in districts with two or more minority groups. It is concluded that with the exception of demands for compensatory and remedial measures like those proposed in "Milliken II," further litigation carries no great promise for improving education for most students. The central tenet of "Brown" is in danger of being lost amidst voluminous paperwork and clever legal arguments. (Contains 78 footnotes.) (LMI)

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# EQUITY, EXCELLENCE AND SCHOOL REFORM:

# A NEW PARADIGM FOR DESEGREGATION

**Discussion Paper for The National Committee for School Desegregation, 15th Annual Conference**

**Session of March 26, 1994**
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# EQUITY, EXCELLENCE AND SCHOOL REFORM:

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The contents of this manual are appropriate as of the date indicated on the cover sheet. Future court or administrative decisions, regulations or legislative action could result in significant changes. Moreover, this manual is meant to provide a general overview and is not intended to provide comprehensive legal guidance. The reader is advised to consult legal counsel with specific questions on particular matters.

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## TABLE OF CONTENTS


INTRODUCTION . . . . . 1

I. BROWN V. BOARD OF EDUCATION -- THE SUPREME COURT RULES THAT SEPARATE IS NOT EQUAL . . . . . 2

A. Implementing the Brown Mandate -- Various Theories are Proposed for Providing Equal Protection to Minority Students . . . . . 3

B. Brown II -- Establishing the Framework for Desegregation Litigation . . . . . 4

II. THE SEARCH FOR CLEAR DEFINITIONS OF "SEGREGATED" VERSUS "UNITARY" SCHOOL DISTRICTS . . . . . 5

A. The De Jure Segregation Requirement and the Use of Legal Presumptions . . . . . 5

B. The Genesis of "the Green Factors" and the Requirement that School Boards Take an Active Role in Ending Desegregation . . . . . 6

C. "Vestiges of Discrimination" -- Desegregation Plaintiffs Seek Discrimination Finding in every Statistical Disparity between Students . . . . . 8

III. OTHER APPROACHES TO EQUAL EDUCATION FOR MINORITY STUDENTS -- MILLIKEN II'S REMEDIAL EDUCATION PROGRAMS AND LANGUAGE REMEDIATION PROGRAMS FOR NON-ENGLISH SPEAKING STUDENTS . . . . . 12

A. Compensatory Education Programs as an Alternative to Integration in All-Minority Districts . . . . . 12

B. Equal Educational Opportunities for a Diverse Group of Students . . . . . 14

CONCLUSION . . . . . 17

## INTRODUCTION

Forty years after the United States Supreme Court first reviewed Brown v. Board of Education[1], the Topeka, Kansas schools are not, according to the federal courts, "desegregated."[2] The question of what a school system must show in order to be declared "desegregated" continues to be defined by the Supreme Court. In this paper, I present an overview of the original Brown decision and the large, complex body of case law that has evolved from it.

The widespread impact of the Brown decision, and its vital role in modern American education, cannot be overstated. Since Brown I, over 500 school districts have come under court desegregation orders.[3] However, while so many have been ordered to desegregate, very few of these schools have ever been found by the courts to have completed the process, that is, declared "unitary."[4] Thus, while the goal of Brown I was ensuring that minority students received equal educational opportunities, forty years later, uncertainty remains as to the most effective method by which this can be accomplished. The question has been complicated by the diversity encompassed in the term "minority students," for while the goal for African-American, Asian, Hispanic, and all other ethnic minority students is an "equal education," their differing needs (such as English language acquisition) render a single, universal solution impossible.

In the time since Brown I, courts have moved much further than a simple finding of discrimination and separate schooling; in response to changing demographic trends and pedagogical theories, courts have been forced to examine questions of "appropriate racial balance," "good faith of a District," and "vestiges of discrimination." Thus, in this time of recession and shrinking budgets, it appears that great expense in money and time will necessarily continue to be expended on legal wrangling over these issues. This is due, in large part, to the fluid terminology courts have used and the multiple interpretations to which the key terms and concepts in desegregation litigation are subject. Many legal findings have been made, but few real solutions have been implemented. In this discussion, I review desegregation law as it developed, in the

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1 (1954) 347 U.S. 483 (hereinafter "Brown I").

2 See, Brown v. Board of Educ. of Topeka (10th Cir. 1992) 978 F.2d 595.

3 Educational Opportunities' Litigation Section, U.S. Department of Justice, Case Load List § III [Report is not paginated] (May 1988) [hereinafter "Case Load List"].

4 For example, of the approximately 300 cases in which the U.S. Department of Justice has been involved, a mere 36 districts have been declared "unitary," with the case entirely dismissed and all outstanding orders dissolved. In all the other cases, the school districts remain under a court order and the federal district courts retain some degree of supervision. New York Times, March 6, 1988, § 1, Part 1, at 29, col. 1; Case Load List § III, supra.

hopes of presenting the educator with the general position and strategy which opposing parties across the country have taken in desegregation litigation, as well as the framework in which courts can rule for decades that schools are "desegregated," but not yet "unitary."

This discussion is divided into three sections. The first section reviews the original Brown holding and the establishment of court supervision of school boards' implementation of desegregation plans. The second section explores how courts applied the Brown mandate and created the vague terminology at issue in modern desegregation litigation. The final section reviews the "compensatory education" alternative, which focuses on improving education for minority students by means other than strict numerical integration, as well as the special problems found in districts with two or more minority groups (including the questions of bilingual education and of multi-ethnic racial balance).

## I. BROWN V. BOARD OF EDUCATION -- THE SUPREME COURT RULES THAT SEPARATE IS NOT EQUAL

The issue before the Supreme Court in 1954 in the Brown I case was the legality of denying minority schoolchildren "admission to schools attended by white children under laws requiring or permitting segregation according to race."[5] In other words, the question was whether it was legal to have separate "black" and "white" schools. The plaintiffs in Brown I argued that state-imposed segregation deprived them "of the equal protection of the laws under the 14th amendment."[6] At the lower court level, this argument had been defeated under the "separate but equal doctrine," which posits that "equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate."[7]

It was the contention of the minority schoolchildren in Brown I "that segregated schools are not 'equal' and cannot be made 'equal,'" and the Supreme Court agreed.[8] Declining to be bound either by the status of public education in 1868 (when the 14th Amendment was adopted) or in 1896 (when "separate but equal" was first announced), the Court decided to "consider public education in the light of its present place in American life throughout the Nation."[9] Hence, the Court concluded, "in the field of public education the doctrine of 'separate but equal' has no place and State laws

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5 Brown I, 347 U.S. at 488.

6 Id.

7 Id., citing to Plessy v. Ferguson (1896) 163 U.S. 537.

8 Id.

9 Id. at 494.

mandating separate educational facilities result in inherently unequal educational opportunities."[10]

Thus, the Brown I Court found that exclusion of black students from schools attended by white students, on the basis of race, labels one race as "inferior" and imposes a stigma of inferiority. Under the United States Constitution, all races are equal and all children have an equal right to the invaluable asset of education. The underlying harm that the Brown court intended to address was inequality of educational input, in terms of educational programs, teachers and other resources, which would provide "equal educational opportunities."

### A. Implementing the Brown Mandate -- Various Theories are Proposed for Providing Equal Protection to Minority Students

Invalidation of laws which required or permitted desegregation was easily done, as they were declared unconstitutional. However, unlike opening military units to all races, or providing a single drinking fountain (rather than one "white" and one "colored"), it is difficult to explain exactly how to make education equal. As teachers and administrators well know, a great many factors influence learning, and it is not always possible to draw a clear line between those influences which are within the control of school officials, and those which are outside their control.[11]

Accepting that "separate is not equal," the courts following Brown have tried to answer the question of "the manner in which relief [for minority students] is to be accorded."[12] Courts first addressed whether a school board was required simply to provide non-discriminatory access to all schools, ensuring that a minority child may enroll in any school he or she wishes. Such a facile solution proved ineffective, however, as is explained below in Section II.B. At one time, courts interpreted the requirement as a physical/statistical one, requiring, for example, school boards to ensure that for every minority child in each classroom there must be a white child present in the same classroom. However, when there were not enough children of one race in a school to match up one-for-one, the busing dilemma arose: whether the school board must find children of a specific race in another school, or even another district, and drive them to a distant school every day to achieve equal numerical balancing.

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[10] Id. at 495.

[11] Indeed, the changes schools have seen in the last few years make this point increasingly valid. Now, introduction of guns and other weapons to the school environment has forced some schools to spend money on security guards or metal detectors, while other schools in a different part of the same district may be able to use their funds to upgrade facilities (e.g., build a computer lab) or hire new faculty. In this context, how can one even begin to evaluate "equality" between such schools?

[12] Brown v. Board of Education (1955) 349 U.S. 294, 298 (hereinafter "Brown II")).

Today, this problem is exacerbated in some areas where the demographics of a school system have changed drastically, and where white children are in the minority. Must a school board parcel out these children so they are equally distributed, even though their presence has nominal impact due to their small numbers? Or, under these circumstances, should school boards create as many schools with 50-50 populations as possible, knowing that some one-race schools will remain? To further complicate the issue of numerical balance, what happens when a school is not only predominately minority, but also contains a multi-ethnic population? Should a school board be required to bus and balance among all the various ethnic groups?

An alternative understanding of the Brown goal would require not only that schools be open to all, (equal opportunity) but also that they assure equal achievement, such that test scores must be roughly equivalent for all races. These theories, none of which has proved entirely satisfactory, are explored in the following discussion.

### B. Brown II -- Establishing the Framework for Desegregation Litigation

The Supreme Court realized from the beginning that "full implementation of [the] constitutional principles [enunciated in Brown I] may require solution of varied local school problems."[13] The Brown II Court established the framework by which desegregation cases were to be litigated and supervised over time. While school districts themselves have the "primary responsibility" for achieving desegregation within their schools, they are overseen by federal district courts. In this way, the courts will arbitrate and be open to both sides, both to the minority schoolchildren and their advocates, who seek to exercise protected constitutional rights, and to the school districts and their boards, who work with limited funds and cannot perform miracles.

The powers of the court, in ruling on desegregation plans, are necessarily flexible. As the Brown II Court emphasized, the federal district courts, "in fashioning and effectuating the decrees . . . [are to] be guided by equitable principles," that is, "a practical flexibility in shaping . . . remedies" and "a facility for adjusting and reconciling public and private needs."[14] Students may criticize their school's desegregation plan, and the court will evaluate whether or not the plan and the school district's actions in relation to it constitute a "good faith implementation of the governing constitutional principles." [15]

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[13] Id. at 299.

[14] Id. at 300.

[15] Id. at 299.

## II. THE SEARCH FOR CLEAR DEFINITIONS OF "SEGREGATED" VERSUS "UNITARY" SCHOOL DISTRICTS

### A. The De Jure Segregation Requirement and the Use of Legal Presumptions

It was obvious that school systems such as those at issue in Brown were segregated, because the segregation there was de jure, "mandated by law" (as opposed to de facto segregation, which arises by means other than law). The question which courts faced after Brown was whether schools in areas other than the South could also be said to be "segregated" and thereby come under the power of court supervision. Many schools were separated by race in places where no laws explicitly required it. Courts developed two methods to find these schools "segregated." The first method involves ruling that a de jure/de facto distinction is irrelevant in the face of the constitutional violation to minority students inherent in separate schools.[16]

The second method defines de jure segregation in a very broad manner and allows a liberal use of presumptions. This theory was used in Keyes v. School District No. 1.[17] Keyes dealt with the Denver, Colorado school system, which had "never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education."[18] The Keyes Court began by emphasizing that "the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate."[19] It then found such intent on the part of the district. Rather than following unconstitutional laws, the Denver District and its Board had "by use of various techniques such as the manipulation of student attendance zones, schoolsite selection and a neighborhood school policy, created or maintained . . . segregated schools throughout the school district."[20]

The Keyes Court also held that a finding of intentional segregation in "a meaningful portion of a school system" would create a presumption that other segregated schools within the system were also "the result of intentionally segregative

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[16] This method was used in California in the landmark case of Crawford v. Board of Education (1976) 17 Cal.3d 280. The Crawford court rejected the de jure/de facto distinction because of practical difficulties in applying the distinction, and ruled that "in California, all public schools districts bear an obligation under the state Constitution to undertake reasonably feasible steps to alleviate school segregation, regardless of the cause of such segregation." 17 Cal.3d at 301-302.

[17] (1973) 413 U.S. 189.

[18] Id. at 192.

[19] Id. at 208 (footnote omitted).

[20] Id. at 192.

actions."[21] The use of presumptions is now pervasive throughout desegregation litigation, and it places school boards and school administrators in the awkward position of being always on the defensive, attempting to prove that their actions were not taken with discriminatory intent, even if the resulting effect appears to be segregative. Additionally, a current school board has to explain the potentially discriminatory actions of all prior school boards. In Swann v. Charlotte-Mecklenburg Board of Education,[22] the Supreme Court held that in a system with a history of statutory segregation, current segregation would be presumed to be the result of prior intentional discriminatory actions.[23] The cases of Dayton II[24] and Columbus Board of Education v. Penick[25] extended this presumption to school districts that were operating intentionally segregated schools at the time of Brown I, even if these schools were not segregated by statute.[26] Further, the Penick court held that a district that was intentionally segregated in 1954 had an affirmative duty from that time on to disestablish its dual (i.e., segregated) school system. Continued segregation in the district would be presumed to indicate that the district had failed in this affirmative duty and thus was continuing to violate the constitution.[27]

### B. The Genesis of "the Green Factors" and the Requirement that School Boards Take an Active Role in Ending Desegregation

Many school systems originally responded to the Brown mandate as though it required only that school districts allow equal access to all schools by children of all races, a system commonly referred to as a "freedom of choice" plan. However, when called upon to evaluate these "freedom" plans, the Supreme Court decided that whether a District "has taken steps adequate to abolish its dual segregated system" begins rather

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[21] Id. at 208.

[22] (1971) 402 U.S. 1.

[23] Id. at 18, 16. See also Keyes, 413 U.S. at 200: "[W]e have held that where plaintiffs prove that a current condition of segregation exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in Brown v. Board of Education, (Brown I), the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.'" (citations omitted) (emphasis added).

[24] (1979) 443 U.S. 526.

[25] (1979) 443 U.S. 449.

[26] Penick, at 455-461 ("[T]he Board had breached its constitutional duty by failing effectively to eliminate the continuing consequences of its intentional systemwide segregation in 1954."); Dayton II, 443 U.S. at 534-540 ("Given intentionally segregated schools in 1954, the Board was thereafter under a continuing duty to eradicate the effects of that system, and the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts.").

[27] Penick, at 456-61.

than ends with the opening of school doors equally to both races.[28] The problem, of course, was that students did not elect to change schools. Hence, the Supreme Court decided in Green v. County School Board of New Kent Co., Va. to charge school boards with taking an active rather than passive role.

In the factual situation presented in Green, no residential (housing) segregation existed, and yet there were two schools at each level, one of which was "black" and one "white" (with the routes of school buses picking up children crisscrossing back and forth). Under the "freedom" plan adopted by the New Kent district, no children of either race applied for admission to the opposite race school. The Court concluded that the plan clearly was not working towards ending segregation and, based on these facts, a new plan must be developed (though it conceded that in different circumstances a similar "freedom" plan might be appropriate).

The Green Court stated that a district is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[29] The Court emphasized that "the burden on a school board today is to come forward with a plan that promises realistically to work, and promises to work now."[30] Further, the Court pragmatically concluded that "there is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."[31]

The importance of the Green case is not limited, however, to its requirement that school boards actively work towards desegregation. The case is also famous for espousing what are now called "the Green factors." In reviewing the facts of the case, the Green Court made the observation that the "racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools, but to every facet of school operations -- faculty, staff, transportation, extracurricular activities and facilities."[32] It does not appear to have been the Court's explicit intention, but these six "factors" have since been transformed into a talisman called "the Green factors," used in every desegregation litigation.

Districts and plaintiffs alike attempt to use these six factors to prove to the court

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[28] Green v. County School Bd. of New Kent Co., Va. (1968) 391 U.S. 430, 437.

[29] Id. at 437-438 (emphasis added).

[30] Id. at 439 (emphasis added).

[31] Id.

[32] Id. at 435 (emphasis added).

that there has or has not been an effective implementation of a desegregation remedy. Bitter battles are waged as to whether these factors constitute a "complete" or only partial list of a school's "racial identifiability," and what exact percentage, for example, of student or faculty minority-majority ratio renders a system non-segregated. The question becomes one of ratios, numbers and statistics, which are susceptible to manipulation and distortion. Courts have heard years of argument regarding whether or not compliance with each "Green" factor should be concurrent or sequential, that is, whether one can be met while others are not, and once one is met, whether or not it may "revert." Thus, mere illustrative examples have been converted to a hard rule, and the underlying principle of Brown, that quality education is vitally important to children, regardless of race, appears to have been crowded from the foreground.

### C. "Vestiges of Discrimination" -- Desegregation Plaintiffs Seek Discrimination Finding in every Statistical Disparity between Students

In addition to the Green factors, another troublesome specter in desegregation litigation is the concept of "vestiges of discrimination." Over twenty years ago in Swann v. Charlotte-Mecklenburg Bd. of Education, the Supreme Court stated that "the objective today remains to eliminate from the public schools all vestiges of state imposed segregation."[33] The general rule today is that in order to be declared unitary and become free of court control, a district needs to make two showings: (1) that it has "complied in good faith with the desegregation decree since it was entered," and (2) that "the vestiges of past discrimination [have] been eliminated to the extent practicable."[34] Unfortunately, the rule is extraordinarily difficult to apply, since "good faith" is a very nebulous standard, and no clear definition exists for what constitutes a "vestige" of discrimination.[35] Hence, an open field has been created for plaintiffs to argue that everything from higher percentages of minorities enrolled in special education classes to higher suspension rates among minorities constitutes "vestiges," with the end result that almost no district can be found to be unitary.

The issue of "vestiges" is normally addressed when determining whether the remedy imposed has fully corrected the original harm. Swann states the basic requirement that "the nature of the violation determines the scope of the remedy."[36]

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[33] Swann v. Charlotte-Mecklenburg Bd. of Education (1971) 401 U.S. 1 (emphasis added).

[34] Board of Ed. Oklahoma City Public Schools v. Dowell (1991) 111 S.Ct. 630, 638.

[35] The Supreme Court has candidly admitted that there is no explicit definition of a "vestige of discrimination." See, e.g., Dowell, 111 S.Ct. at 644 (J. Marshall, dissenting; "the Court has never explicitly defined what constitutes a "vestige" of state-enforced segregation"). See also, Freeman v. Pitts (1992) 112 S.Ct. 1430, 1451 (J. Scalia, concurring); and Dowell v. Bd. of Educ. of Oklahoma City Public Schools, (10th Cir. 1993) 8 F.3d 1501, 1514-1516.

[36] Swann, 402 U.S. at 16.

However, because of the extensive use of presumptions in school desegregation cases, as discussed above, neither the "nature of the violation" nor "the scope of the remedy" is easy to determine. Since the violation is defined as intentional segregation, at first glance it might seem that the district could claim to have remedied the violation simply by urging that it had abandoned its intent to segregate. The Court has made clear, however, that a school board must "do more than abandon its prior discriminatory purpose."[37]

School boards are facing the dilemma now whether any statistical disparity in the Green factors creates a prima facie (initial) showing of discrimination, as well as whether vestiges and presumptions regarding discrimination can be limited only to the Green factors or whether they can be expanded to include factors like "student achievement" as measured by performance on standardized tests. There is much litigation in this heavily debated area. Neither the Ninth Circuit Court of Appeals nor the United States Supreme Court has definitively addressed how far the concept of "vestiges" will extend in unitary status proceedings.

Plaintiffs will argue that the Supreme Court has approved of the expansion of "vestiges" beyond the Green factors on the basis of Freeman v. Pitts.[38] However, the Freeman court addressed "quality of education" only indirectly, so that its comments on the issue are dicta; the Court did not definitively rule that if a district's students of all races are not receiving roughly equal test scores that a "vestige" exists.[39] The Freeman Court stated:

> Addressing the more ineffable category of quality of education, the District Court [trial court] rejected most of respondents' contentions that there was racial disparity in the provision of certain educational resources (e.g., teachers with advanced degrees, teachers with more experience, library books), contentions made to show that black students were not being given equal educational opportunity. The District Court went further, however, and examined the evidence concerning achievement of black students in [the district]. It cited expert testimony praising the overall educational

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[37] Dayton II, 443 U.S. at 538.

[38] (1992) 112 S.Ct. 1430.

[39] One district court has recently made such a finding however (and cited Freeman as precedent). In United States v. City of Yonkers (S.D.N.Y., 1993), 833 F.Supp. 214, the court found race to be a "statistically significant factor" in lower math and reading test scores among African-American and Hispanic students, and that this lower "achievement" was a result of a "vestige of discrimination" and required active attention from the district (including retraining of teachers to ensure that they have equally high expectations for their minority as majority students, and an alteration of school curriculum to be more "multicultural" rather than geared towards majority students alone, as well as improvement in the physical facilities provided minority students).

> program in the District, as well as objective evidence of black achievement: black students at [the district] made greater gains on the Iowa Tests of Basic Skills (ITBS) than white students, and black students at [the district] are more successful than black students nationwide on the Scholastic Aptitude Test . . .
>
> Despite its finding that there was no intentional violation, the District Court found that [the district] had not achieved unitary status with respect to quality of education because teachers in schools with disproportionately high percentages of white students tended to be better educated and have more experience than their counterparts in schools with disproportionately high percentages of black students, and because per pupil expenditures in majority white schools exceeded per pupil expenditures in majority black schools.

The fact that the Court included quality of education in its discussion of the District Court's analysis of the Green factors does not, by itself, indicate the Court thereby established quality of education as a new Green factor to be considered on any school district's application for unitary status. In this initial section of the decision, the Court was simply reporting the findings of the District Court, not ruling on the propriety of those findings.

In part II-B of its opinion, the Court addressed whether the Court of Appeals erred in holding that the District Court could not allow the school district to regain control over certain areas "while retaining court supervision over the areas of faculty and administrative assignments and quality of education, where full compliance had not been demonstrated."[40] As an initial step of this analysis, the Court states that,

> It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in Green, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to insure full compliance with the court's decree.[41]

The Court goes on to state that,

> Both parties agreed that quality of education was a legitimate inquiry in determining [the district's] compliance with the desegregation decree, and the trial court found it workable to consider the point in connection with

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[40] Freeman, at 1446.

[41] Id. at 1446 (emphasis added).

its findings on resource allocation. Its order retaining supervision over this aspect of the case has not been challenged by the parties and we need not examine it except as it underscores the school district's record of compliance in some areas and not in others. The District Court's approach illustrates that the Green factors need not be a rigid framework. It illustrates also the uses of equitable discretion. By withdrawing control over areas where judicial supervision is no longer needed, a district court can concentrate both its own resources and those of the school district on the areas where the effects of de jure discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students.[42]

The Court's holding on quality of education as a factor affecting unitary status appears to be limited to a finding that the District Court properly exercised its discretion when it identified factors beyond those identified in Green as appropriate for analysis in this case. Both parties agreed that quality of education was a relevant factor, and neither party challenged this aspect of the District Court's decision. Thus, the propriety of considering quality of education as a relevant factor on a petition for unitary status was not at issue in the case.

Nevertheless, the Court appears to approve the approach taken by the District Court, including its identification of new and different factors, in addition to the Green factors, as appropriate for consideration, depending upon the circumstances of each case. This approval opens the door for plaintiffs to argue in subsequent cases that quality of education is an appropriate factor to be considered in any given case, and further, to argue that other new factors they may identify are relevant and ought to be considered by the Court. An important consideration will be whether that factor was included in a prior court-ordered desegregation decree for that school district. As noted above, the District Court's analysis of quality of education included a discussion of student achievement levels.[43] The Supreme Court does not offer any comment on the appropriateness of considering such evidence. Thus, this is an open issue which, in all likelihood, will be subject to future United States Supreme Court analysis.

Possible expansion of "vestiges of discrimination" to include disparate achievement by minority students is particularly topical in light of the recent fall into disfavor among educational theorists of the pedagogical practice of "achievement grouping." While "achievement" or "ability" grouping, also disparagingly referred to as "tracking," was widely used in the American educational system long before Brown, it has become an important vehicle by which plaintiffs in desegregation litigation unearth discrimination against minority students. Desegregation plaintiffs argue that, despite a

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[42] Id. (emphasis added).

[43] Id. at 1441-1442.

district's claim that race is not a factor in its grouping system, if there is a statistical disparity in classrooms (e.g. the "higher" track classes consist of a high proportion of majority students while the "lower," less difficult classes are disproportionately minority) unconstitutional segregation is present. In evaluating grouping practices in a district not yet unitary, courts require the district to defend its grouping practices by proving that "its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities."[44] In approving the use of grouping, some courts have found that lower achievement by minority students did not necessarily implicate race or evidence racial discrimination on the part of the district.[45] However, if a court finds the grouping practices have a substantial segregative effect and are discriminatory, the district will be ordered to substitute a new method of assigning students to classrooms before it may be found to be unitary.[46]

## III. OTHER APPROACHES TO EQUAL EDUCATION FOR MINORITY STUDENTS -- MILLIKEN II'S REMEDIAL EDUCATION PROGRAMS AND LANGUAGE REMEDIATION PROGRAMS FOR NON-ENGLISH SPEAKING STUDENTS

### A. Compensatory Education Programs as an Alternative to Integration in All-Minority Districts

The years following Swann (1971) saw elaborate busing and gerrymandering techniques -- (the moving of students to a distant school, where their race is underrepresented) -- used as a pervasive "desegregation" technique. The result was that many parents, who could afford to do so, removed their children from the public school system entirely to send them to private schools more conveniently located (a phenomenon commonly referred to as "white flight"). Thus, in many areas across the nation, as a result of courts relying on Brown, public schools became not "white" or "black" but simply "minority and poor," and thus presumably with the stigmatic injury of Brown unremedied.

One example of an almost entirely minority district is the Detroit school system,

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[44] McNeal v. Tate (5th cir.1975) 508 F.2d 1017, 1020.

[45] See, e.g., Montgomery v. Starkville Municipal Separate School Dist. (5th cir. 1988) 854 F.2d 127, 130 (court found grouping practices nondiscriminatory and accepted expert testimony that the presence of a University in the district and "the socioeconomic background of children, rather than their race, determined [achievement group] distribution"). See also Quarles v. Oxford Municipal Separate School District (5th cir. 1989) 868 F.2d 750, and Georgia State Conf. of Br. of NAACP v. State of Georgia (11th cir. 1985) 775 F.2d 1403, 1419 (court accepted that rather than race and segregation "family background" and "hard work" had "most powerful and consistent relationship to school success."). But cf. Yonkers, supra at note 39.

[46] See, e.g., United States v. Gadsen County School District (5th cir. 1978) 572 F.2d 1049.

which came before the Supreme Court in Milliken v. Bradley.[47] In Detroit, one inner city district was composed almost entirely of African-American students, while the surrounding suburban districts were composed almost entirely of Anglo students. The issue before the court was "whether a federal court may impose a multi-district area-wide remedy to a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their District."[48] The trial court reasoned that an "intra-city" plan, involving only the Detroit district and not the outlying suburban districts "would make the Detroit school system more identifiably Black" and therefore "would not accomplish desegregation."[49] Hence, since "school district lines are simply matters of political convenience and may not be used to deny constitutional rights," the court decided that it "must look beyond the limits of the Detroit school district for a solution to the problem."[50]

The court of appeals agreed with the trial court, reasoning that "any less comprehensive a solution than a metropolitan area plan would result in an all black school systems immediately surrounded by practically all white suburban school systems" and that "such segregation can [not] be any less harmful to the minority students than if the same result were accomplished within one school district."[51] The Supreme Court disagreed, however, ruling that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy" and that "to approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court."[52]

Thus, the problem remained--how can a district having almost entirely minority students become "integrated" and accord its students their constitutional rights under Brown? In Milliken II,[53] heard three years after Milliken I, the Supreme Court approved two aspects of the Detroit districts' alternative plan. The first aspect was similar to those being used in many schools, and required shifting the Detroit district's roughly 70-30% black-white student population to assure "that every school within the

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47 Milliken v. Bradley (1974) 418 U.S. 717 ("Milliken I").

48 Id. at 721.

49 Id. at 733.

50 Id.

51 Id. at 736.

52 Id. at 746.

53 Milliken v. Bradley (1977) 433 U.S. 267 ("Milliken II").

district reflected, within 15 percentage points, the racial ratio of the school district as a whole."[54] The second aspect called for implementation of thirteen "remedial or compensatory educational programs," which included such things as extra training for teachers and administrators and guidance and counseling programs.[55] The Court upheld this plan and the compensatory programs, and required the State to pay some of the costs. Hence, the Court approved not only the "spreading out" of a few white students, but also the "compensating" minority students who continued to attend what were, in essence, "black" schools.

The Court's rationale in Milliken II was that: 1) "the need for educational components flowed directly from constitutional violations by officials"; 2) "imbalanced student assignments could "manifest and breed other inequalities"; and, 3) "pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures."[56] Thus, Milliken II recognized that not every remedy had to be directly related to a constitutional violation, but rather, only needed to be tailored to address "the consequences of the Constitutional violation."[57] Since Milliken II, courts have considered the "consequences of the constitutional violations" to require remedial or compensatory programs in both core academic subjects (like math and reading) and in "human relations" aspects, including in-service training and special counseling to help students, parents, and faculty deal with "the various pressures which arise as a result of desegregation."[58]

### B. Equal Educational Opportunities for a Diverse Group of Students

In 1974, the same year the Supreme Court handed down its Milliken I decision, the Court decided Lau v. Nichols, a case relating to non-English speaking students of Chinese ancestry who attended school in the San Francisco Unified School District.[59] The District had previously undergone court-ordered desegregation, and, in fact, the Supreme Court itself had reviewed the desegregation plan, finding in Lee v. Johnson, that "there are many minorities in the elementary schools of San Francisco...

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[54] Id. at 273.

[55] Id.

[56] Id. at 282, 283 (emphasis added).

[57] Id. at 287.

[58] See, e.g., Evans v. Buchanan, (3rd Cir. 1978) 582 F.2d 750, 770-71.

[59] Lau v. Nichols (1974) 94 S.Ct. 786

[including students of] Chinese, Japanese, Filipino... African and Spanish ancestry."[60] In San Francisco, the Court ruled, a "classic case of de jure segregation" existed, in light of prior California statutory requirements regarding establishment of separate schools for children of "Indian, Chinese, Japanese or Mongolian parentage" and the fact that the school board drew and maintained school attendance lines in order to foster segregation.[61]

As the Lee Court stated, "Brown v. Board of Education was not written for Blacks alone... [rather] the theme of our school desegregation cases extends to all racial minorities treated invidiously by a State or any of its agencies."[62] However, this extension of Brown, (for minority students to receive equal educational opportunities they must not be isolated) proved insufficient to meet the needs of all San Francisco's minority students. In fact, the strategy proposed in Lau v. Nichols requires that some minority students must be separated to receive such opportunities. The Lau Court found "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[63] The Lau plaintiffs, students who spoke little or no English, had requested that the Board direct itself to their plight and "rectify the situation." The Lau appellate court denied the plaintiffs relief, reasoning that "every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system"; the Supreme Court reversed, stating that "in our view the case may not be so easily decided."[64] It found that the district has a duty, under Title VI, to provide special language assistance if its curriculum otherwise would exclude the students from participation in the instructional process.[65] While the Lau holding was not explicitly based on an equal protection argument (because the Court found that it need only rely

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[60] Lee v. Johnson, 92 S.Ct. at 14.

[61] Id.

[62] Id.

[63] Lau v. Nichols, 94 S.Ct. at 788.

[64] Id. at 788.

[65] Id. However, the Lau Court did not dictate the specific form of assistance the Board must provide, stating, "no specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others." 94 S.Ct at 787, 788.

on the Civil Rights Act of 1964[66]), the problems encountered by "linguistic minority students," including low achievement, high dropout rates, and the need to "confer self esteem, respect and dignity" have become as much the focus of ongoing debate as equal access for minority students generally.[67]

Following Lau, a variety of teaching methods and theories have been implemented to afford linguistic minority students an "equal education," and, unfortunately, a certain amount of tension has arisen between the mandates of desegregation and language minority student instruction, which necessarily requires that students (usually of one race, for example, Hispanic students in a Spanish/English bilingual program) be separated from other students to some degree. In one recent case, African-American students requested that Hispanic students enrolled in bilingual programs not be included in the calculation of the number of "minority" students at a particular school, but the court declined the request because there was "at least some interaction" (e.g., homeroom and extracurricular activities such as student elections) between students enrolled in bilingual programs and the remainder of the student body.[68] Clearly, such a holding is an exception to the type of integration envisioned by Brown, which required much more than students of all races merely attending homeroom together.

The "Bilingual Education" versus "ESL" (English as a second-language) debate[69] raises the question, also seen in conventional desegregation law, of the degree to which a particular cultural orientation (evidenced in this case by language) should be fostered or, alternatively, be subverted to that of the majority. The Brown Court did not reach this question, but, as discussed above, courts have required that curriculum be "multicultural" rather than geared only to majority students. The "bilingual v. ESL" debate, as with the question of "tracking" or achievement grouping, requires one to address whether integrated classrooms are necessary, especially if separation of students can be shown to facilitate to some degree the achievement of at least one group of students (if, for example, achievement grouping were shown to help higher ability students or bilingual education shown to help linguistic minority students).

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[66] Specifically, the Lau Court relied on Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, which bans discrimination on the ground of race, color, or national origin in any program or activity receiving Federal financial assistance. See, Lau, 94 S.Ct. at 788.

[67] See, Moran, "The Politics of Discretion: Federal Intervention in Bilingual Education," (1988) 76 Cal.L.Rev. 1249, 1252-53. Moran provides a detailed review of the complex history of bilingual education legislation in this country, helpful in understanding the legal, social and political background of these issues.

[68] See, Coalition to Save Our Children v. Buchanan (D.Del. 1990) 744 F.Supp. 582, 594.

[69] Whether students should be learning all subjects in their native language while also studying English, or should learn English first, intensively, and join mainstream classes taught entirely in English as soon as possible.

Future plaintiffs will likely increasingly request that the term "minority" in a desegregation order distinguish students by ethnicity, rather than grouping all students of color together. In this way, schools or classrooms could not be composed entirely of white and Asian students, while others were largely Hispanic and African-American, with only the latter qualifying technically as "segregated." Such an argument might be made, for example, by Hispanic plaintiffs in a district where white and Asian students were statistically overrepresented in "high" track or "college prep" classes, and yet the school board maintained that "minorities" were thoroughly integrated and the district should be declared unitary. The question whether the term "minority" should be subdivided for desegregation purposes will necessarily center upon the treatment minority groups have historically received in each particular district (for example, if the court were to find that only Hispanics have been historically disfavored in a given district). In any case, the issue of defining "minority students" and affording students of all races an "equal education," is complex, illustrating that implementation of Brown in this diverse nation requires a number of different, occasionally conflicting strategies.

## CONCLUSION

As discussed earlier, a very large number of schools were found to be segregated following Brown, but very few have ever reached unitary status, and have instead spent time and money litigating over the implementation of their desegregation plans. Still, the Supreme Court has always maintained that court supervision of school districts is merely a temporary measure which should end as soon as possible.[70] The unresolved question, however, is just when this temporary measure should end. The Green Court explained that "whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."[71] The Swann Court also discussed the need for federal trial courts to retain jurisdiction to oversee the implementation of remedies, but stressed that court intervention is intended to be finite, stating that

> At some point, these school authorities . . . should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' . . . [At that point], in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.[72]

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[70] See, e.g. Dowell, 498 U.S. 237, 247 ("from the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination.")

[71] Green, 391 U.S. at 439.

[72] Swann, 402 U.S. at 31-32.

In other words, it appears that if schools become numerically or statistically "resegregated" due to demographics alone, there is no further need for court supervision, as long as the district's actions were not a contributing cause of the demographic change.[73]

In Swann, the Court appeared to equate the unitariness finding with the point at which a district court's jurisdiction should terminate. Further, the court indicated that after that time, a complaining party would have to prove intent or a "deliberate attempt" to resegregate on the part of the school board in order to restore the jurisdiction of the court. Finally, in Pasadena City Board of Education v. Spangler,[74] the Court explicitly held that once a desegregation plan in the area of student assignment had achieved "a system of determining admission to the public schools on a nonracial basis,"[75] the district court was without power to order further relief, absent new showings of intentionally segregative actions by the school board.[76] Also, the Supreme Court emphasized in Freeman that "racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors."[77]

While the Supreme Court has not provided clear guidance on how to determine the termination point for a school desegregation case, it is clear that the Court does envision that there will be a termination point. Further, while the Court has not defined "unitariness" with anything approaching precision, it does appear to equate the "unitary" point with the point at which the burden of proving future violations by the school board should return to the plaintiffs.

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[73] Indeed, the Tenth Circuit Court if Appeals has recently ruled that even when current residential segregation originated in laws and private contracts enforced by the courts and supported by local school board policies, once the school board has implemented a constitutionally acceptable desegregation plan, and has for some considerable time distributed minority students throughout the school system more or less in their proportion to the total population, then changes in attendance zones that alter the racial makeup of the schools are no longer constitutionally significant if the school board establishes that the changes were made for valid reasons unrelated to discrimination. In this way, a district can break the causal link between residential segregation, or one-race neighborhood schools, and its own actions. At that point, these circumstances will be viewed as the result of individual choices and socioeconomic forces, not district acts. Dowell v. Bd. of Educ. of Oklahoma City Public Schools, (10th Cir. 1993) 8 F.3d 1501, 1519-1520.

[74] (1976) 427 U.S. 424, 434.

[75] Id. at 435 (quoting Brown II, (1955) 349 U.S. 294, 300-01).

[76] Id. at 435-36.

[77] Freeman, 112 S.Ct. at 1447.

The problem for courts, and for students and educators, is that racially separate schools (and in some cases classrooms) still do exist. It is quite possible, though difficult to prove, that the cause of "one race" schools is beyond the control of a school district (e.g., changing demographics or "white flight") and that the result of statistically disproportionate achievement by some minority groups is rooted in socioeconomic and familial factors, rather than discrimination on the part of school boards. With the exception of demands for compensatory and remedial measures like those proposed in Milliken II, further litigation carries no great promise of improved education for most students. In the meantime, schools are becoming more and more unsafe, teachers salaries are shrinking, and American students are lagging far behind students in other industrialized countries in academic achievement.[78] Two groups -- plaintiffs and school boards -- who should be on the same side fighting for an improved education system, are instead fighting in court.

The Court stated long ago in Brown that "today, education is perhaps the most important function of state and local governments" and that "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." These statements are equally true today, but it may be that this central tenet of Brown is in danger of being lost amidst voluminous paperwork and clever legal arguments.

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[78] See, e.g., "Public Schools are Failing Gifted Students," New York Times, November 5, 1993, p. A10 (discussing findings of recent Department of Education study that the top ten percent of American students compare poorly with top students in other industrialized countries).